



Volume 100

Issue 3 *National Coal Issue*

Article 10

April 1998

An Overview of the Ownership and Control Rule under the West Virginia Surface Coal Mining and Reclamation Act

Charles Saffer

West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>

 Part of the [Environmental Law Commons](#), and the [Oil, Gas, and Mineral Law Commons](#)

Recommended Citation

Charles Saffer, *An Overview of the Ownership and Control Rule under the West Virginia Surface Coal Mining and Reclamation Act*, 100 W. Va. L. Rev. (1998).

Available at: <https://researchrepository.wvu.edu/wvlr/vol100/iss3/10>

This Student Note is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

AN OVERVIEW OF THE OWNERSHIP AND CONTROL RULE UNDER THE WEST VIRGINIA SURFACE COAL MINING AND RECLAMATION ACT

| | | |
|------|--|-----|
| I. | INTRODUCTION | 741 |
| II. | STATUTORY FRAMEWORK | 742 |
| III. | DETERMINING OWNERSHIP AND CONTROL | 746 |
| | A. <i>Division of Environmental Protection</i> | 747 |
| | B. <i>Surface Mine Board</i> | 749 |
| | C. <i>Judicial Review</i> | 751 |
| IV. | FUTURE ISSUES | 752 |
| | A. <i>Application</i> | 752 |
| | B. <i>Legality</i> | 756 |
| | C. <i>Federal Intervention</i> | 759 |
| V. | CONCLUSION | 760 |

I. INTRODUCTION

The coal industry has been, and continues to be, big business in West Virginia. For example, in 1995, West Virginia coal exports were valued at approximately two billion dollars, and approximately 20,000 West Virginians were employed by the industry at an average weekly wage of \$954.00.¹ Coal mining, however, is an industry that requires substantial regulation to ensure that coal operators act responsibly in extracting coal.² Requiring permits to engage in mining is an important part of that regulatory process because prospective coal operators must meet numerous application criteria in order to obtain a permit.³ Part of the permit application process is the “ownership and control” rule.⁴ If an applicant “owns or controls” an operation that is in violation of the West Virginia Surface Coal Mining and Reclamation Act (“West Virginia Act”), or any other environmental law, that violation is linked to the applicant and the applicant is then

¹ See WEST VIRGINIA COAL ASSOCIATION, WEST VIRGINIA COAL FACTS 1996 3, 5 (1996).

² See CURTIS E. HARVEY, COAL IN APPALACHIA: AN ECONOMIC ANALYSIS 89-90 (1986) (explaining the need for regulation in the coal industry).

³ See W. VA. CODE §§ 22-3-8 to -9 (1994).

⁴ See W. VA. CODE § 22-3-18(c) (1994).

blocked from receiving any surface mining permits in West Virginia.⁵ Therefore, it is vital for coal operators to know which operations will be linked to them, because, to unblock, a permit the applicant must submit proof that the violation has either been corrected or is in the process of being corrected.⁶

This Note discusses the ownership and control rule as it presently stands and is applied in West Virginia. First, the Note sets out the statutory framework from which the ownership and control rule is derived. Next, the Note explores the process for determining ownership and control. Finally, the Note discusses several issues in the application and legality of the rule that have been raised by recent decisions rendered by state and federal courts.

II. STATUTORY FRAMEWORK

The federal government enacted the Surface Mining Control and Reclamation Act of 1977 ("SMCRA")⁷ to establish a regulatory system for surface mining.⁸ Under SMCRA, the Office of Surface Mining Reclamation and Enforcement ("OSM") has the power to oversee surface mining and to enforce the provisions of the act.⁹ A state regulatory agency, however, may take over OSM's role if the state achieves primacy over mining.¹⁰ Primacy is achieved by obtaining OSM approval of a state-designed regulatory system.¹¹ Once a state achieves primacy, the state assumes "exclusive jurisdiction over the regulation of surface

⁵ *See id.*

⁶ *See id.*

⁷ 30 U.S.C. §§ 1201-1328 (1994).

⁸ *See* 30 U.S.C. § 1202(a) (1994).

⁹ *See* 30 U.S.C. § 1211(a) (1994).

¹⁰ *See* 30 U.S.C. § 1253(a) (1994). The United States Code states, in part, Each State in which there are or may be conducted surface coal mining operations on non-federal lands, and which wishes to assume exclusive jurisdiction over the regulation of surface coal mining . . . shall submit to the Secretary . . . a State Program which demonstrates that such State has the capability of carrying out the provisions of this chapter. . . .

Id.

¹¹ *See id.*

coal mining and reclamation operations.”¹² OSM does, however, retain oversight powers in those states.¹³

West Virginia is a primacy state with its own surface mining act.¹⁴ West Virginia enacted its statute with the goal of regulating the coal industry in a way that balances both economic and environmental interests.¹⁵ The West Virginia Act sets out numerous regulations that coal operators must follow in extracting coal.¹⁶ Furthermore, West Virginia wanted its own act to ensure that the unique topographical characteristics of West Virginia be specifically considered in the regulatory process.¹⁷

The West Virginia Act installed the West Virginia Division of Environmental Protection (“DEP”) and the Office of Miner Health Safety and Training as the chief administrators and enforcers of the act’s provisions.¹⁸ The DEP uses the permit application process as a means of enforcing the provisions of the West Virginia Act because all surface mining operations must obtain permits from the director of the DEP.¹⁹ A permit application must provide detailed

¹² *Id.*

¹³ See 30 U.S.C. § 1271(a) (1994); *Coteau Properties Co. v. Dept. of Interior*, 53 F.3d 1466, 1469 (8th Cir. 1995) (quoting *In re Permanent Surface Mining Regulation Litig.*, 653 F.2d 514, 519 (D.C. Cir. 1981)).

¹⁴ See Surface Coal Mining and Reclamation Act, W. VA. CODE §§ 22-3-1 to -32 (1994).

¹⁵ See W. VA. CODE § 22-3-2(a) (1994). The West Virginia Code states, in part, The legislature finds that it is essential to the economic and social well-being of the citizens of the state of West Virginia to strike a careful balance between the protection of the environment and the economical mining of coal needed to meet energy requirements.

Id.

¹⁶ See W. VA. CODE § 22-3-1 to -32 (1994).

¹⁷ See W. VA. CODE § 22-3-2(a) (1994).

¹⁸ See W. VA. CODE § 22-3-2(d) (1994). The West Virginia Code states, in part, The director of the division of environmental protection and the director of miners health, safety and training shall cooperate with respect to each agency’s programs and records to effect an orderly and harmonious administration of the provisions of this article.

Id.

¹⁹ See W. VA. CODE § 22-3-8 (1994). The West Virginia Code States, in part, “[n]o person may engage in surface-mining operations unless such person has first obtained a permit from the director. . . .” *Id.*

information, which includes the applicant's business structure,²⁰ the area the applicant plans to mine,²¹ and the method of mining the applicant plans to use.²² The West Virginia Act further requires that if an applicant, or any operation that an applicant owns or controls, is in violation of the West Virginia Act or any other environmental law, that applicant is blocked from receiving any future surface mining permits in West Virginia.²³ The West Virginia Act does not, however, define what constitutes ownership or control.

²⁰ See W. VA. CODE § 22-3-9(a)(4) (1994). The West Virginia Code states, in part, (a) The Surface Mining permit shall contain: . . .

(4) If the applicant is a partnership, corporation, association or other business entity, the following where applicable: The names and addresses of every officer, partner, resident agent, director or person performing a function similar to a director, together with the names and addresses of any person owning of record ten percent or more of any class of voting stock of the applicant; and a list of all names under which the applicant, officer, director, partner, or principal shareholder previously operated a surface mining operation in the United States within a five year period preceding the date of submission of the application. . . .

Id.

²¹ See W. VA. CODE § 22-3-9(a)(12) (1994). The West Virginia Code states, in part, (a) The Surface Mining permit shall contain: . . .

(12) Accurate maps to an appropriate scale showing: (A) The land to be affected as of the date of the application; (B) the area of land within the permit area upon which the applicant has a legal right to enter and conduct surface-mining operations; and (C) all types of information set forth in enlarged topographical maps of the United States geological survey of a scale of 1:24,000 or larger, including all man-made features and significant known archaeological sites existing on the date of application. In addition to other things specified by the director, the map shall show the boundary lines and names of present owners of record of all surface area abutting the proposed permit area and the location of all structures within one thousand feet of the proposed permit area

Id.

²² See W. VA. CODE § 22-3-9 (1994). The West Virginia Code states, in part, "(a) The Surface Mining Permit shall contain: . . . (7) [a] description of the type and method of surface mining operation that exists or is proposed, the engineering techniques used or proposed, and the equipment used or proposed to be used." *Id.*

²³ See W. VA. CODE § 22-3-18(c) (1994).

SMCRA contains a similar provision that also fails to define what constitutes ownership or control.²⁴ Consequently, in 1988, OSM enacted a set of rules that supplied the missing definitions of ownership and control.²⁵ OSM intended that the definitions would establish a “minimum threshold of ownership” that would be both reasonable and realistic.²⁶ “Chance occurrences,” OSM reasoned, should not play a significant role in determining whether an operator who otherwise complies with the law can obtain a permit.²⁷ Moreover, a regulatory agency is in no position to sift through “every thread of common ownership” every time an operator applies for a permit.²⁸

The DEP promulgated a rule identical to a part of the federal ownership and control rule.²⁹ The West Virginia rule consists of two sets of relationships that can establish ownership and control.³⁰ Paragraph (a) of the regulation defines the relationships that automatically establish ownership or control:

- a.1 Being a permittee of a surface coal mining operation;
- a.2 Based on instrument of ownership or voting securities, owning of record in excess of fifty (50) percent of an entity; or
- a.3 Having any relationship which gives one person authority directly or indirectly to determine the manner in which an applicant, an operator, or other entity conducts surface mining operations.³¹

The definitions set out in paragraph (a)(4) establish a rebuttable presumption of ownership or control:

²⁴ See generally 30 U.S.C. § 1260(c) (1994).

²⁵ See 30 C.F.R. § 773.5 (1996) (defining what relationships constitute ownership or control).

²⁶ See *Requirements for Surface Coal Mining and Reclamation Permit Approval; Ownership and Control*, 53 Fed. Reg. 38868, 38870 (1988).

²⁷ *Id.*

²⁸ *Id.*

²⁹ Compare W. VA. CODE STATE . § 38-2-2.84 (1996) (effective date August 1, 1997) with 30 C.F.R. § 773.5 (1996).

³⁰ See W. VA. CODE STATE R. § 38-2-2.84 (1996) (effective date August 1, 1997).

³¹ *Id.*

- A. Being an officer or director of an entity;
- B. Being the operator of a surface mine operation;
- C. Having the ability to commit financial and real property assets to the working resources of an entity;
- D. Being a general partner in a partnership;
- E. Based on the instruments of ownership or the voting securities of a corporate entity, owning ten (10) through fifty (50) percent of the entity; or
- F. Owning or controlling coal to be mined by another person under a lease, sublease, or other contract and having the right to receive such coal after mining or having the authority to determine the manner in which that person or another person conducts a surface mining operation.³²

The West Virginia ownership and control rule, therefore, contains two parts: a broad statute without a definition of ownership and control, and a regulation that actually defines the relationships that constitute ownership and control.³³ Thus, in order to assess whether it owns or controls an operation, a coal operator must examine both the West Virginia Act and its corresponding regulations.

III. DETERMINING OWNERSHIP AND CONTROL

As the chief enforcement body, the DEP makes the first determination of ownership and control during the application process.³⁴ If an applicant disagrees with the DEP's determination, the applicant may appeal to the surface mine board, which reviews the DEP's determination by holding a hearing.³⁵ At that hearing, the board may review any evidence brought before it and is not required to defer to the DEP's previous decision.³⁶ Following the mine board's decision, a West Virginia court may review the decision only to see if it was "[c]learly wrong in view of the reliable, probative and substantial evidence on the whole record" or "[a]rbitrary or

³² *Id.* § 38-2-2.84.a.4.

³³ *See* W. VA. CODE § 22-3-18(c) (1994); W. VA. CODE STATE R. § 38-2-2.84 (1996) (effective date August 1, 1997).

³⁴ W. VA. CODE §§ 22-3-3(d), 22-3-18(c) (1994).

³⁵ *See* W. VA. CODE § 22B-1-7(e), (f) (1994).

³⁶ *See* West Virginia Div. of Env'tl. Protection v. Kingwood Coal Co., 490 S.E.2d 823, 825 (W. Va. 1997); *see also* W. VA. CODE § 22B-1-7(e), (g) (1994).

capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.”³⁷

A. *Division of Environmental Protection*

Under the West Virginia Act, the West Virginia Division of Environmental Protection is charged with enforcing its provisions.³⁸ As chief enforcement body, the DEP must inspect existing mining operations and penalize operators that the DEP finds in violation of the act.³⁹ Moreover, the DEP must regulate the permit process for future surface mining operations, and during this process it applies the ownership and control rule.⁴⁰

When a permit application is submitted, the Director of the DEP must either approve or deny the application.⁴¹ In making that decision, the director must determine whether the applicant owns or controls any violating entities.⁴² The extensive information required in the permit application makes the applicant an important supplier of information necessary to establish an ownership or control link with a violating entities.⁴³ The DEP may also tap into the Federal Applicant Violator System (AVS) to identify who owns or controls a particular operation.⁴⁴ The AVS is a “computer system that identifies whether an applicant for a permit is linked by ownership and control to any person having outstanding violations of

³⁷ W. VA. CODE § 29A-5-4 (g)(5)-(6) (1993).

³⁸ See W. VA. CODE § 22-3-2 (d) (1994). The West Virginia Code states, in part, “The director of the division of environmental protection and the director of miners health, safety and training shall cooperate with respect to each agency’s programs and records to effect an orderly and harmonious administration of the provisions of this article.” *Id.*

³⁹ See W. VA. CODE §§ 22-3-14, -17 (1994).

⁴⁰ W. VA. CODE §§ 22-3-17, -18(c) (1994); W. VA. CODE STATE R. § 38-2-2.84 (1996) (effective date August 1, 1997).

⁴¹ See W. VA. CODE § 22-3-18 (1994).

⁴² See W. VA. CODE § 22-3-18(c) (1994).

⁴³ See W. VA. CODE § 22-3-9 (1994) (outlining information about the applicant’s business that must be submitted to the DEP).

⁴⁴ For an example of the DEP tapping into the AVS, see *West Virginia Div. of Env’tl. Protection v. Kingwood Coal Co.*, 490 S.E.2d 823, 827 n.8 (W. Va. 1997).

federal or state surface mining laws.⁴⁵ The AVS was established by court order to combat the common coal industry practice of changing company names and forming new business organizations in order to avoid a permit block for a previous, unabated SMCRA violation.⁴⁶

Upon obtaining information about an applicant's relationship with a violating entity, the DEP will then determine if the relationship between the applicant and the violator fits the West Virginia definition of ownership or control.⁴⁷ If the director finds sufficient facts to establish a relationship under section (a) of the regulation, ownership or control is irrefutably established.⁴⁸ If a section (b) relationship links the applicant to a violator, then the applicant may rebut the presumption by establishing by a preponderance of the evidence that it does not own or control the violating entity.⁴⁹ The DEP will evaluate the evidence submitted by the applicant and issue a final agency decision on the issue of ownership and control.⁵⁰ If the applicant is linked to a violator, then the director cannot issue a permit to the applicant until the applicant submits proof that the violation has been corrected or is being corrected to the satisfaction of the director.⁵¹

Besides having a permit blocked in West Virginia, an applicant also faces the prospect of the DEP's listing the link between the applicant and the violator on the AVS.⁵² Listing on the AVS blocks a coal operator from receiving any future federal mining permits, and OSM requests that all state agencies deny that

⁴⁵ *Pittston Co. v. Lujan*, 798 F. Supp. 344, 345 (W.D. Va. 1992), *aff'd*, 66 F.3d 714 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 1417 (1996).

⁴⁶ See Chauncy S.R. Curtz & Karen J. Greenwell, *The Applicant Violator System Under SMCRA: Ownership and Control Regulations*, 6 J. MIN. L. & POL'Y 143, 144-145 nn.12-15 (1990/1991) (citing *Save Our Cumberland Mountains Inc. v. Watt*, 550 F. Supp. 979 (D.D.C. 1982); 53 Fed. Reg. 38,868 (1988)).

⁴⁷ See *Kingwood Coal*, 490 S.E.2d at 826.

⁴⁸ See W. VA. CODE STATE R. § 38-2-2.84.a.1-3 (1996) (effective date August 1, 1997). For example, under section a.2., if Company A owns 51% of the stock in company B, Company A is deemed to own or control Company B.

⁴⁹ See W. VA. CODE STATE R. § 38-2-2.84.a.1-3. (1996) (effective date August 1, 1997); *Kingwood Coal Co.*, 490 S.E.2d at 829 n.11 (quoting *Requirements for Surface Coal Mining and Reclamation Permit Approval; Ownership and Control*, 53 Fed. Reg. 38868, 38879 (1988)).

⁵⁰ See *Kingwood Coal Co.*, 490 S.E.2d at 829.

⁵¹ See *id.* at 827 n.8 (citing W. VA. CODE § 22-3-18(c) (1994)).

⁵² See *id.*

operator's permit applications as well.⁵³ Thus, an ownership and control determination in one state can have nationwide ramifications for a coal operator.⁵⁴

Although an ownership and control rule does not shift liability for an unabated violation, permit blocking has a "coercive" effect on applicants because mining permits are essential to doing business.⁵⁵ Consequently, once the DEP decides that the applicant owns or controls a violator, the applicant faces the serious economic consequences of being permit blocked.⁵⁶ Applicants in West Virginia can, however, appeal the DEP decision to the mine board.⁵⁷

B. *Surface Mine Board*

The mine board is a seven-member panel appointed by the governor with the advice and consent of the West Virginia State Senate.⁵⁸ In order to serve on the board, a member must have special qualifications.⁵⁹

⁵³ See Curtz & Greenwell, *supra* note 46, at 146 n.22.

⁵⁴ See generally Curtz & Greenwell, *supra* note 46.

⁵⁵ See *id.* at 150-51.

⁵⁶ See W. VA. CODE § 22-3-18(c) (1994).

⁵⁷ See W. VA. CODE § 22-3-17(e) (1994).

⁵⁸ See W. Va. CODE § 22B-4-1(b) (1994).

⁵⁹ See *id.* The West Virginia Code states, in part, One of the appointees to such board shall be a person who, by reason of previous vocation, employment or affiliations, can be classed as one capable and experienced in coal mining. One of the appointees to such board shall be a person who[,] by reason of training and experience, can be classed as one capable and experienced in the practice of agriculture. One of the appointees to such board shall be a person who[,] by reason of training or experience, can be classed as one capable and experienced in modern forestry practices. One of the appointees to such board shall be a person who, by reason of training and experience, can be classed as one capable and experienced in engineering. One of the appointees to such board shall be a person, who by reason of training and experience, can be classed as one capable and experienced in water pollution control or water conservation problems. One of the appointees to such board shall be a person with significant experience in the advocacy of environmental protection. One of the appointees to such board shall be a person who represents the general public interest.

Id.

Any person who has a right that is adversely affected by a decision of the DEP may appeal to the mine board.⁶⁰ The appellant is required to file its petition within thirty days of receiving the DEP's final decision.⁶¹ The mine board then hears the appeal and chooses to affirm, reverse, or modify the DEP's decision.⁶²

In analyzing the appeal process, the standard of review employed by a reviewing body is the threshold question, because the more deference a reviewing body is required to give to an initial determination, the less power it has in deciding the case.⁶³ The statute governing appeals to the board contains two provisions that set out the procedure for reviewing a DEP decision.⁶⁴ The first provision states that the mine board is to hear appeals of DEP decisions *de novo* and that evidence may be offered by the "appellant, appellee and by any intervenors."⁶⁵ Furthermore, the board is free to visit the site and take any evidence it deems necessary.⁶⁶ The second provision, however, states that the board is to affirm the DEP's decision if that decision was "lawful and reasonable" and to reverse or modify the decision if it was "not supported by substantial evidence in the record."⁶⁷ In a recent decision, the West Virginia Supreme Court of Appeals addressed the question of what standard of review those statutory provisions impose on the mine board.⁶⁸ In

⁶⁰ See W. VA. CODE § 22-3-17(e) (1994). The West Virginia Code states, in part, "Any person having an interest which is or may be adversely affected by any order of the director or the surface mine board may file an appeal. . . ." *Id.*

⁶¹ See W. VA. CODE § 22B-1-7(c) (1994). The rule differs slightly for parties entitled to appeal who are not subject to the order. Those parties are required to appeal within 30 days of receiving service of the DEP's final decision. *Id.*

⁶² See W. VA. CODE § 22B-1-7(g)(2) (1994).

⁶³ See *In re Queen*, 473 S.E.2d 483, 487 (W. Va. 1996) (noting that a standard of review that looks only for decisions that are "clearly wrong" or "arbitrary and capricious" presumes that the agency's actions were valid).

⁶⁴ See W. VA. CODE § 22B-1-7(g)(2), (e) (1994).

⁶⁵ W. VA. CODE § 22B-1-7(e) (1994) The statute grants the right to intervene to "any person affected by the matter pending before the board." *Id.*

⁶⁶ See W. VA. CODE § 22B-1-7(e) (1994).

⁶⁷ W. VA. CODE § 22B-1-7(g)(2) (1994).

⁶⁸ See *West Virginia Div. of Env'tl. Protection v. Kingwood Coal Co.*, 490 S.E.2d 823 (W. Va. 1997).

Division of Environmental Protection v. Kingwood Coal Co.,⁶⁹ the court reviewed a decision by the mine board that had reversed a DEP decision finding Kingwood Coal Company controlled a violator.⁷⁰

The court considered the statutory provisions “inharmonious” and decided that it was the court’s duty “to construe [the statutory provisions] in order to effectuate the legislature’s intent.”⁷¹ The court then held that the mine board was to conduct a *de novo* review of DEP decisions.⁷² Therefore, the mine board need not give any deference to a DEP decision.⁷³ The court reached this conclusion because the legislature’s use of the term *de novo* and allowing the taking of new evidence demonstrated its intent for the mine board to freely evaluate a DEP decision without any “presumption of correctness attaching to it.”⁷⁴ Thus a hearing before the mine board represents a second chance for a coal operator to prove it does not own or control a violator. Furthermore, this hearing may be an operator’s last chance because the mine board’s decision is the final word in the determination of ownership and control unless the parties appeal the mine board’s ruling to the courts.⁷⁵

C. *Judicial Review*

If a mine board ruling is appealed, a court reviews the board’s determination to see if it was “[c]learly wrong in view of the reliable, probative and substantial evidence on the whole record” or “[a]rbitrary or capricious or

⁶⁹ *Id.*

⁷⁰ *See id.* at 825.

⁷¹ *Id.* at 833.

⁷² *See id.* at 833-34.

⁷³ *See id.* at 834.

⁷⁴ *Id.* (quoting BLACKS LAW DICTIONARY at 721 (6th ed. 1990); *Big Fork Mining Co. v. Tennessee Water Quality Control Bd.*, 620 S.W.2d 515, 521 (Tenn. Ct. App. 1982)) BLACKS LAW DICTIONARY provides, in pertinent part,

[H]earing *de novo* . . . means generally, a new hearing or a hearing for the second time, contemplating an entire trial in the same manner in which the matter was originally heard and a review of previous hearing. Trying the matter anew the same as if it had not been heard before and as if no decision had been previously rendered.

BLACKS LAW DICTIONARY at 721.

⁷⁵ *See* W. VA. CODE § 29A-5-4(g)(5) (1993) (providing judicial review of state agency action).

characterized by an abuse of discretion or clearly unwarranted exercise of discretion.”⁷⁶ Absent this type of obvious mishandling, the board’s decision will stand.⁷⁷ Thus, because the courts are limited to correcting only the most egregious of errors when reviewing an ownership or control determination, a dispute over ownership and control is usually decided at the administrative level.

IV. FUTURE ISSUES

The State of West Virginia and coal operators face future issues concerning the application and validity of the ownership and control rule. One issue involves whether the presumption of ownership or control that arises between the parties to a coal lease agreement can be applied without substantially hobbling the coal industry. Another is whether the rule is valid in light of the United States Court of Appeals for the District of Columbia’s decision that struck down the federal rule.⁷⁸ A final issue for both the state and coal operators is whether OSM can intervene in the ownership and control determination process.

A. *Application*

Section (b)(6) of the West Virginia ownership and control rule establishes a rebuttable presumption of ownership or control (“(b)(6) presumption”) in situations where an applicant owns or controls coal mined under a lease and has the right to receive the coal.⁷⁹ The rationale behind the presumption is that more often than not the lessor or coal owner is in control of the operation.⁸⁰ Consequently, to the extent a coal operator exercises control over a contract miner, the operator “should be held responsible for any outstanding violations” committed by its lessee or contract miner.⁸¹

The ramifications of the (b)(6) presumption are potentially far-reaching because the relationships created by the coal lease are a “linchpin” of the industry,

⁷⁶ W. VA. CODE § 29A-5-4(g)(5)-(6) (1993).

⁷⁷ *See id.*

⁷⁸ *See Nat’l Mining Ass’n v. United States Dept. of the Interior*, 105 F.3d 691 (D.C. Cir. 1997).

⁷⁹ *See* W. VA. CODE STATE R. § 38-2-2.84.a.4.F. (1996) (effective date August 1, 1997).

⁸⁰ *Requirements for Surface Coal Mining and Reclamation Permit Approval; Ownership and Control*, 53 Fed. Reg. 38868, 38877 (1988).

⁸¹ *Id.*

and contract miners are long-time fixtures in the industry.⁸² Contract miners have flourished because many coal reserves cannot be mined profitably on a large scale, and contract miners have less overhead than that of large coal companies, which allows a lower per-ton production cost.⁸³ Another reason for the widespread use of contract miners is that a contract miner may insulate the owner from liability for events that occur during the mining process.⁸⁴ Because of the prevalence of coal leases and contract miners, the idea that these relationships could constitute ownership or control invokes what some commentators have called “Orwellian fears” throughout the coal industry.⁸⁵

These same commentators have criticized the (b)(6) presumption, positing that it will have a detrimental effect on the coal industry.⁸⁶ They claim that the rule forces lessors to guarantee a contract miner’s regulatory compliance and that any standard coal lease could easily be construed to establish ownership or control.⁸⁷ They also claim that the presumption will complicate the drafting of future lease agreements.⁸⁸ Furthermore, these critics of the presumption contend that the presumption is unfair because it forces coal operators to deal with violations in situations where the operator may not have the power or ability to correct the violation, as when the operator is no longer in a business relationship or even in contact with the actual violator.⁸⁹

Are those “Orwellian” fears of the (b)(6) presumption being realized in West Virginia? The case of *West Virginia Division of Environmental Protection*

⁸² See Sam P. Burchett, *The Applicant Violator System in Transition*, 21 N. KY. L. REV. 555, 559 n.28 (1994) (referring the reader to Donald H. Vish, *Private Coal Leases*, 6 E. MIN. L. INST. § 2 (1985)); see also John R. Woodrum, *Liability of Mineral Owners for the Actions of Their Contractors Under the Surface Mining Control and Reclamation Act of 1977*, 10 E. MIN. L. INST. § 8.02 (1989).

⁸³ See Woodrum, *supra* note 82, § 8.02.

⁸⁴ See *id.* § 8.02 n.4 (citing 2 RESTATEMENT (SECOND) OF TORTS § 409 (1976)).

⁸⁵ See Burchett, *supra* note 82, at 561 (referring to industry fears that all lessor/lessee or contract miner relationships could constitute ownership or control).

⁸⁶ See *id.*

⁸⁷ See Curtz & Greenwell, *supra* note 46, at 162; Burchett, *supra* note 82, at 563.

⁸⁸ See Burchett, *supra* note 82, at 564.

⁸⁹ See Curtz & Greenwell, *supra* note 46, at 152.

*v. Kingwood Coal Co.*⁹⁰ illustrates how the surface mine board resolved a recent (b)(6) presumption case. The events that eventually would culminate in the *Kingwood* decision began in 1971 when T & T Fuels Incorporated ("T & T") entered into a lease agreement with the Kingwood Mining Company ("KMC").⁹¹ The lease gave T & T the exclusive right to mine certain tracts of land in Preston County, West Virginia.⁹² The parties also agreed that KMC would purchase all the coal produced by T & T on the leased tract, and T & T subsequently began mining on what became T & T mine No. 2.⁹³ The agreement was later amended to add an additional tract of land that became known as T & T No. 3.⁹⁴ In 1990, when KMC sold Kingwood Coal Company ("Kingwood") all of its assets, Kingwood obtained the rights to the leases for T & T Mines Nos. 2 and 3.⁹⁵ By 1993, the coal reserves in T & T Nos. 2 and 3 were exhausted, and T & T installed a mine seal on T & T Mine No. 2.⁹⁶ In 1994, a blowout occurred at No. 2, and acid mine drainage ("AMD") was discharged into the Cheat River. The DEP is currently spending \$60,000 a month to cleanup the discharge.⁹⁷

Following the AMD discharge, the DEP conducted an investigation and learned of the lease agreement and the sales agreement between KMC and T & T.⁹⁸ Acting on that information, the DEP requested additional information from Kingwood about its relationship with T & T.⁹⁹ Using that information, the DEP ascertained that because T & T was a lessee of KMC and had a sales agreement

⁹⁰ 480 S.E.2d 823 (W. Va. 1997).

⁹¹ *Id.* at 826

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at n.8.

⁹⁹ *Id.*

with KMC, a (b)(6) presumption of ownership or control had been established.¹⁰⁰ Kingwood was advised that it had the opportunity to rebut the presumption by putting forth evidence that it did not own or control T & T.¹⁰¹ Kingwood tried to do so by submitting various documents and affidavits to the DEP.¹⁰² The DEP, however, was not persuaded and upheld the presumption of ownership and control.¹⁰³

The mine board reviewed the DEP's determination and reversed it, finding instead that KMC neither owned nor controlled T & T.¹⁰⁴ The mine board found that KMC's activities, which were necessary and proper under the lease to ensure KMC's right to have maximum recovery of the coal reserve, were not "evidence of control."¹⁰⁵ The board also evaluated the sales agreement between KMC and T & T and found that Kingwood's activities under the coal sales agreement ensuring that T & T met its quality requirements were not evidence of ownership and control.¹⁰⁶

The mine board's handling of the *Kingwood* case indicates that if a lessor's actions are within the rights created by a lease or sales agreement to maximize recovery of coal reserves, those actions will not be considered evidence of control.¹⁰⁷ The mine board's decision indicates that a company can make the decision to have coal mined and can profit from that coal without being found to own or control the operation actually doing the mining.¹⁰⁸ The result in *Kingwood* should be heartening to the coal industry because it was made in spite of evidence that KMC employees discussed specific aspects of the mining operation with T & T employees such as the location of headings, the coal to be mined, and placement

¹⁰⁰ *Id.* at 826-27(citing W. VA. CODE STATE R. tit. 38, § 2-2.84.a.4.F. (1996) (effective date August 1, 1997)).

¹⁰¹ *Id.* at 827-28.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 829.

¹⁰⁵ *Id.* at 831 (quoting the Final Order of the Surface Mine Board at Conclusion of Law No. 10).

¹⁰⁶ *Id.* (quoting the Final Order of the Surface Mine Board at Conclusion of Law No. 11).

¹⁰⁷ See *supra* note 105 and accompanying text.

¹⁰⁸ *Id.* at 843-45 (Starcher, J., dissenting).

of future panels within the mine.¹⁰⁹ Thus, in West Virginia it appears that coal operators need not fear that coal leases and sales agreements will automatically force them to guarantee a contract miner's or lessee's regulatory compliance.

B. *Legality*

Recently, the Court of Appeals for the District of Columbia declared the ownership and control rule promulgated by OSM pursuant to SMCRA unlawful under the standard for reviewing agency rules set out in the 1984 United States Supreme Court decision, *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*¹¹⁰ This ruling could affect the West Virginia ownership and control rule because the West Virginia regulation is taken word for word from the now unlawful federal rule.¹¹¹ The West Virginia Supreme Court of Appeals acknowledged this similarity in a footnote to the *Kingwood* case.¹¹² The court, however, chose not to address the issue.¹¹³ Consequently, the issue of whether the West Virginia ownership and control rule is valid after *Chevron* remains unsettled.

OSM issued the federal ownership and control rule in 1988.¹¹⁴ OSM then promulgated the permit-information rule that required applicants to furnish information about the operations they own or control and about the entities that own or control them.¹¹⁵ A third rule, the permit rescission rule, was promulgated to

¹⁰⁹ *Id.* (quoting Director of the Department of Environmental Protection, Final Agency Decision (April 25, 1995)).

¹¹⁰ 467 U.S. 837 (1984); *see also* Nat'l Mining Ass'n v. United States Dept. of Interior, 105 F.3d 691, 694 (D.C. Cir 1997).

¹¹¹ Compare W. VA. CODE STATE R. tit. 38, § 2-2.84 (effective date August 1, 1997) with 30 C.F.R. § 773.5 (1996).

¹¹² *See Kingwood*, 490 S.E.2d at 832 n.15.

¹¹³ *See generally id.* The West Virginia Supreme Court of Appeals stated, in part, We note that both the DEP and Kingwood acknowledge that the federal ownership and control rule . . . was found to be unlawful Both parties insist, however, that the validity of our state's (b)(6) presumption is not challenged in this case, was not raised below, and is presently not before this Court. We therefore will not address the issue in this appeal.

Id.

¹¹⁴ *See* 30 C.F.R. §§ 773.5, 773.15(b) (1995).

¹¹⁵ *See Nat'l Mining Ass'n*, 105 F.3d at 693 (citing 30 C.F.R. § 778.13(a)-(d) (1995)).

establish procedures for revoking permits for violators of the ownership and control rule.¹¹⁶

The National Mining Association brought a lawsuit challenging the legality of the three rules.¹¹⁷ The United States Court of Appeals for the District of Columbia evaluated the OSM rules under the test determining the lawfulness of agency rules set out in the *Chevron* decision.¹¹⁸ Under *Chevron*, courts apply a two-step test to review an agency rule.¹¹⁹ First, the court asks “whether Congress has directly spoken to the precise question at issue.”¹²⁰ If so, then “that is the end of the matter; for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress.”¹²¹ A statute that is silent or ambiguous, however, gives the agency room to interpret, and a court must give that interpretation deference.¹²²

The circuit court applied the first step of the *Chevron* test by examining the language of section 510(c) of SMCRA and found that the act unambiguously stated that if “any surface mining operation owned or controlled by the applicant was in violation of the federal act, a permit shall not be issued.”¹²³ Therefore, because Congress had addressed the issue of “whose violations are relevant before an applicant’s permits can be blocked,” OSM had no gap to fill regarding the issue.¹²⁴ The OSM rule, however, mandated that permits be blocked not only if an applicant owned or controlled a violator, but also if an “operation that owns or controls” the applicant is a violator.¹²⁵ As such, the OSM rule amounted to an attempt “to use

¹¹⁶ *Id.* (citing 54 Fed. Reg. 18,438 (1989); 30 C.F.R. §§ 773.20-21, 843.21 (1995)).

¹¹⁷ *See id.* at 691.

¹¹⁸ *Id.* at 694 (quoting *Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 842 (1984)).

¹¹⁹ *See id.* at 694.

¹²⁰ *See id.* (quoting *Chevron*, 467 U.S. at 842)

¹²¹ *Id.* (quoting *Chevron*, 467 U.S. at 842-43).

¹²² *Id.*

¹²³ *Id.* (quoting 30 U.S.C. § 1260(c) (1994)).

¹²⁴ *Id.*

¹²⁵ *Id.* (quoting 30 C.F.R. § 773.15(b)(1) (1995)).

section 510(c) to regulate those not covered by that section.”¹²⁶ The OSM rule, therefore, was an unlawful contradiction of the statutory language enacted by Congress.¹²⁷

Following the District of Columbia Court of Appeals’s decision, the question in West Virginia becomes, is the West Virginia ownership and control rule unlawful as well? The West Virginia ownership and control rule is taken verbatim from the definition section of the federal rule.¹²⁸ The West Virginia rule, however, is limited exclusively to those definitions and does not borrow from any other portion of the federal rule.¹²⁹

The West Virginia Act clearly sets out that violations committed by operations that are owned or controlled by the applicant are relevant in deciding to block a permit.¹³⁰ Under *Chevron*, the DEP regulations could not change whose violations are relevant.¹³¹ Because the West Virginia rule is merely defining what constitutes ownership and control but not determining whose violations are relevant in deciding to block a permit, it appears to be a perfectly lawful agency interpretation of the West Virginia Surface Mining Act.

¹²⁶ *Id.* at 695.

¹²⁷ *Id.* at 694 (quoting 30 C.F.R. § 773.15 (b)(1) (1995)). By way of illustration, under the SMCRA provision, if A controls B, B’s violations are relevant in deciding whether to block A’s permit but A’s violations are not relevant in deciding whether to block B’s permit. The OSM rule, however, made A’s violations relevant in deciding whether to block B’s permit. *Id.* Following the Court of Appeals for the District of Columbia’s decision, OSM began the construction of a new ownership and control rule. See Letter from Kathy Karpan, Director Office of Surface Mining and Enforcement (Oct. 29, 1997) available at <<http://www.osmre.gov/6102997.txt>> (introducing Ownership and Control Redesign Concept Paper). Because the former rule was “surrounded by controversy and beset by litigation,” OSM decided that the redesign of the ownership and control rule would involve “public outreach” strategies during which “all interested parties” would get an opportunity to provide input into the direction of the new ownership and control regulations. *Id.*

¹²⁸ Compare W. VA. CODE STATE R. tit. 38, § 2-2.84 (1996) (effective date August 1, 1997) with 30 C.F.R. § 773.5 (1996).

¹²⁹ Compare W. VA. CODE STATE R. tit. 38, § 2-2.84 (1996) (effective date August 1, 1997) with 30 C.F.R. § 773.15(b) (1996).

¹³⁰ See W. VA. CODE § 22-3-18(c) (1994).

¹³¹ See *Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

C. *Federal Intervention*

Even though West Virginia is a primacy state with exclusive jurisdiction over the regulation of surface mining within its borders, the federal government retains a limited right to oversee West Virginia's regulatory efforts.¹³² Thus, a relevant question is whether that limited right to oversee allows OSM to intervene in an ownership and control determination conducted in West Virginia. The Eighth Circuit Court of Appeals partially answered that question in a 1995 case when it decided whether a state agency's determination of ownership and control was within the oversight powers "reserved to the Secretary of the Interior and through him the OSM."¹³³ In that case, the Eighth Circuit held that under current OSM regulations, OSM did have the authority to evaluate a state agency's determination of ownership and control.¹³⁴

Section 1271(a) of SMCRA provides that if the Secretary of the Interior receives notice that a person is in violation of the SMCRA, the Secretary must report that violation to the state regulatory authority.¹³⁵ If the state authority does not take action within ten days, the Secretary must order a federal inspection of the operation in question.¹³⁶ If the violation "creates an imminent danger to the public's health or safety, or to the environment," the Secretary may issue a cessation order.¹³⁷

In *Coteau Properties Co. v. Department of the Interior*,¹³⁸ OSM argued that section 1271(a) allowed OSM to review North Dakota's determination that Coteau Properties Company did not control a third-party violator. The court found that the authority to review North Dakota's determination of ownership and control was not contained in SMCRA itself and instead looked to the regulations promulgated pursuant to SMCRA to determine if those regulations gave OSM that authority.¹³⁹

¹³² See 30 U.S.C. § 1271(a) (1994).

¹³³ *Coteau Properties Co. v. Dept. of the Interior*, 53 F.3d 1466 (8th Cir. 1995).

¹³⁴ See *id.* at 1474.

¹³⁵ See *id.* (citing 30 U.S.C. § 1271(a) (1994)).

¹³⁶ See *id.* at 1473 (citing 30 U.S.C. § 1271(a)(1) (1994)).

¹³⁷ *Id.* (citing 30 U.S.C. § 1271(a)(2) (1994)).

¹³⁸ *Id.*

¹³⁹ *Id.* at 1474.

The federal regulations examined by the court provide that OSM must intervene for any condition that is a violation of state or federal law.¹⁴⁰ Part of that intervention is a federal inspection of the mining operation under suspicion.¹⁴¹ The court then reasoned that if a federal inspection includes investigating a mining operation's financial affairs, then the regulations authorize OSM to review a state determination of ownership and control.¹⁴² The court, however, did not evaluate the constitutionality of the OSM regulations.¹⁴³

Because the Eighth Circuit did not decide the constitutionality of the OSM regulations, evaluating whether OSM may intervene in an ownership and control determination is somewhat speculative. The *Coteau* case does give coal operators fair notice that they may have to deal with OSM intervention into a West Virginia ownership and control determination. However, OSM's power to review a state ownership or control determination is limited to taking action only if the state's action was arbitrary or capricious or constituted an abuse of discretion.¹⁴⁴ Consequently, the role of OSM should be limited.¹⁴⁵

V. CONCLUSION

Determining which operations a coal operator owns and controls is critical to fair and effective enforcement of West Virginia's mining regulations. An unfair or ineffective ownership rule will upset the balance between protecting the environment and having an economically viable coal industry. An unfair or ineffective rule would seriously damage both responsible coal operators and the environment by allowing irresponsible coal operators to flourish and profit while responsible coal operators foot the bill for the inevitable increase in the cost of

¹⁴⁰ *Id.* (citing 30 C.F.R. §§ 842.11, 843.12 (1989)).

¹⁴¹ *See* 30 C.F.R. § 843.12(a)(2) (1996).

¹⁴² *Coteau Properties Co.*, 53 F.3d at 1474.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1475 (quoting 30 C.F.R. § 842.11(b)(1)(B)(2) (1989)). The Code of Federal Regulations provides, in pertinent part, "[A]n action or response by a State regulatory authority that is not arbitrary, capricious, or an abuse of discretion under the state program shall be considered 'appropriate action' to cause a violation to be corrected or 'good cause' for failure to do so." 30 C.F.R. § 842.11(b)(1)(B)(2) (1989).

¹⁴⁵ *Id.*

doing business.¹⁴⁶ The *Kingwood* case illustrates that in West Virginia coal operators have a fair chance to prove they do not own or control an operation. Consequently, responsible coal operators should not fear the ownership and control rule.

Charles Saffer

¹⁴⁶ West Virginia Div. of Env'tl. Protection v. Kingwood Coal Co., 490 S.E.2d 823, 844 (W. Va. 1997) (Starcher, J., dissenting).

